SUPREME COURT OF NOVA SCOTIA

Citation: *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7

Date: 20180118
Docket: Hfx No. 466745
Registry: Halifax

Between:

Lydia Sorflaten, Fred Blois, Jim Harpell, Kendall McCulloch and Allan Sorflaten

Applicants

v.

Nova Scotia Minister of Environment, The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia, and Lafarge Canada Inc., a body corporate

Respondents

Decision – Motion to Introduce Evidence beyond the Record

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	December 14, 2017, in Halifax, Nova Scotia
Counsel:	William L. Mahody, Q.C., and Jamie Tax, for the Applicants Sean Foreman, for the Respondent Nova Scotia Minister of the Environment John Keith, Q.C., and Jack Townsend, for the Respondent Lafarge Canada Inc.

By the Court:

Introduction

[1] The applicants have filed an application for judicial review of a decision made by the Nova Scotia Minister of Environment on July 6, 2017, wherein he approved a pilot project for the burning of recycled tires as fuel at a cement plant owned by the respondent Lafarge. That judicial review is scheduled to be heard in 2018.

[2] The present motion, made by the applicants, seeks to introduce evidence at that judicial review hearing beyond the record. Specifically, the applicants seek to introduce expert opinion evidence from Dr. Douglas J. Hallett, a toxicologist, relating to certain environmental aspects of the plan approved by the Minister.

[3] The respondents object to such new evidence being introduced at this hearing.

Facts

[4] The respondent Lafarge operates a cement plant in Brookfield, Nova Scotia. Over the past few years the company has developed an interest in the use of scrap tires as a fuel source in their plant. Starting in 2016, in conjunction with Dr. Mark

Gibson of the Department of Process Engineering and Applied Science at Dalhousie University, Lafarge began development of a pilot project for doing so. The following steps were undertaken:

1. August 16, 2016: a meeting between Lafarge and representatives of Ecology Action Nova Scotia.

2. September 28, 2016: a meeting between Lafarge and local area residents (including some of the applicants) where concerns were raised and discussed; a press release was then sent to advise of the next public meeting.

3. 1470 postcards were sent to area residents about the next public meeting, as well as notices in area newspapers.

4. October 20, 2016: a public meeting with area residents was held. A presentation was made by Dr. Mark Gibson about his research in this area; further discussion was had and a further follow-up meeting was scheduled.

5. December 15, 2016: Lafarge contacted the Department of Environment and provided them with a draft report, seeking to know the environmental assessment requirements of the Department.

6. January 26, 2017: the Department advised Lafarge that a full environmental assessment process was required pursuant to Part IV of the *Environment Act*. A further public meeting took place, where some information display boards were presented, describing the intention of Lafarge to apply for necessary approval and proceed with the project.

7. February 7, 2017: Lafarge and Dr. Gibson met with representatives of Sipekne'katik First Nation to discuss the project; they also met with Council for the Municipality of the County of Colchester.

8. March 16, 2017: Lafarge submitted an Environmental Assessment Registration Document to the Minister of the Environment. The Minister confirmed that the document met the minimum requirements under the regulations and it was "registered" on March 23, 2017.

9. Public notice of such registration was given in local newspapers, along with a request for written comments from the public, to be addressed to the Nova Scotia Department of the Environment.

10. Five submissions were received as a result of this public notice, but none from any of the applicants herein.

11. Further consultation was undertaken with First Nations communities and 8 other departments and agencies of the federal and provincial governments.

12. May 10, 2017: Nova Scotia Environment staff reported to the Minister and recommended that an Environmental Assessment Approval be issued for the project. Meetings and briefings were held in May 2017 and June 2017 to further discuss the project.

13. July 6, 2017: the Minister of the Environment approved the project, and provided the following written decision:

> The environmental assessment of the proposed Lower Carbon Fuel: Tire Derived Fuel (TDF) System, in Colchester County has been completed.
>
> This is to advise that I have approved the above project in accordance with Section 40 of the *Environment Act*, S.N.S., 1994-95 and subsection 13 (1) (b) of the Environmental Assessment Regulations, N.S. Reg. 348/2008, made under the *Act.* Following a review of the information provided by Lafarge Canada Inc. and the information provided during the government and public consultation of the environmental assessment, I am satisfied that any adverse effects or significant environmental effects of the undertaking can be adequately mitigated through compliance with the attached terms and conditions.
>
> This approval is subject to any other approvals required by statute or regulation, including but not limited to, approval under Part V of the Nova Scotia *Environment Act* (Approvals and Certificates section).

[5] This decision is the subject of the applicants' application for judicial review, which hearing will be held in the normal course. I should note that there appears to be no dispute that the appropriate standard of review at that judicial review hearing

will be “reasonableness”; i.e., was the decision within a range of reasonable outcomes.

[6] Given that the Minister’s decision references the Nova Scotia *Environment Act*, I find it appropriate to now reference it myself, specifically its purposes and principles:

> 2. The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:
>
> (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
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> (b) maintaining the principles of sustainable development, including
>
> (i) the principle of ecological value, ensuring the maintenance and restoration of essential ecological processes and the preservation and prevention of loss of biological diversity,
>
> (ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation,
>
> (iii) the principle of pollution prevention and waste reduction as the foundation for long-term environmental protection, including (A) the conservation and efficient use of resources, (B) the promotion of the development and use of sustainable, scientific and technological innovations and management systems, and (C) the importance of reducing, reusing, recycling and recovering the products of our society,
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> (iv) the principle of shared responsibility of all Nova Scotians to sustain the environment and the economy, both locally and globally, through individual and government actions,
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> (v) the stewardship principle, which recognizes the responsibility of a producer for a product from the point of manufacturing to the point of final disposal,
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> (vi) the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon

> sound environmental management and that effective environmental protection depends on a strong economy, and
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> (vii) the comprehensive integration of sustainable development principles in public policy making in the Province;
>
> (c) the polluter-pay principle confirming the responsibility of anyone who creates an adverse effect on the environment that is not *de minimis* to take remedial action and pay for the costs of that action;
>
> (d) taking remedial action and providing for rehabilitation to restore an adversely affected area to a beneficial use;
>
> (e) Government having a catalyst role in the areas of environmental education, environmental management, environmental emergencies, environmental research and the development of policies, standards, objectives and guidelines and other measures to protect the environment;
>
> (f) encouraging the development and use of environmental technologies, innovations and industries;
>
> (g) the Province being responsible for working co-operatively and building partnerships with other provinces, the Government of Canada, other governments and other persons respecting transboundary matters and the co-ordination of legislative and regulatory initiatives;
>
> (h) providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment, including opportunities to participate in the review of legislation, regulations and policies and the provision of access to information affecting the environment;
>
> (i) providing a responsive, effective, fair, timely and efficient administrative and regulatory system;
>
> (j) promoting this Act primarily through non-regulatory means such as co-operation, communication, education, incentives and partnerships.

Proposed new evidence

[7] The applicants' motion is made pursuant to Civil Procedure Rule 7.27(1), which provides as follows:

> 7.27 (1) A party who proposes to introduce evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.

[8] The applicants have provided an affidavit from Dr. Hallett. In it Dr. Hallett indicates that he has reviewed the Record in this matter, and is "seriously concerned that in a number of material respects, the Record does not support, in any reasonable manner, the conclusion that this project can be established and operated without adverse effects or significant environmental effects." Dr. Hallett indicates that, if this Court permits, he would prepare and file a report. He sets out a number of "issues", that he has determined are relevant, and that he would propose to address in his report:

> 1. Is the conclusion that the project can be established and operated without adverse effects or significant environmental effects based on commonly accepted science or empirical evidence?
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> 2. Does the Record reasonably present the fact that when tires are burned, they emit the cancer causing chemical NDMA (N-Nitrosodimethylamine)?
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> 3. Has the Record accurately considered the realities of cement kiln production, including conditions on start-up, shut down and during "upset" conditions?
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> 4. What information is available in the Record regarding the operational reliability of the plant, including:
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> a. Data to establish the frequency of upset during the 52 year operational history;
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> b. Data related to the environmental impact of the current plant or future operations proposed;
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> c. Data regarding the current toxic chemical impact of the plant; and
>
> d. Consideration as to whether the current toxic chemical impact, and the anticipated toxic chemical impact from TDF are compliant with the Canadian Environmental Protection Act;
>
> If the above information is not available in the Record, is there a reasonable basis to conclude that the project can operate without adverse effects or significant environmental effects?

5. Does the proposal as approved by the Minister adequately distinguish how tires will be introduced into the Lafarge Brookfield kiln?

6. Does the Record contain air dispersion modelling of the current and proposed emissions at the Lafarge Plant?

7. Does the Record disclose a complete analysis of NDMA, other priority pollutants, and toxic metal oxides from the disposal of ash residuals from the kiln or electrostatic precipitator and those materials that are emitted to the local environment when the kiln is in start-up or not in steady state operation?

8. Does the Record disclose adequate consideration of the local residents and their uses of the area?

9. Does the Record disclose consultations with Environment Canada?

10. Can the areas identified above be adequately considered as part of a highly conditioned test period?

Judicial Review

[9] Generally speaking, courts have not permitted the introduction of new evidence beyond the record on an application for judicial review. This is because since the new evidence was not before the Minister when his decision was made, it cannot assist in determining whether he made a reasonable decision on the evidence before him:

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conduct a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible… If the applicant alleges bias, use of statutory power for an

> improper purpose, fraud on the tribunal, absence of evidence to support a material finding of fact or failure to follow fair procedure, the court may grant leave to file evidence proving these allegations… (Blake, Administrative Law in Canada, 5th ed.)

[10] This general principle is based on the fundamental difference between a judicial review, and other proceedings that might take place in a courtroom. A judicial review is, put simply, a review of a decision made by an administrative decision-maker. It is not a trial, nor is it a "re-trial" of the question before the administrative decision maker. In *Alberta Liquor Store Assn. v. Alberta (Gaming & Liquor Commission)* 2006 ABQB 904, the Court made the point that a judicial review is not a search for "universal truth":

> 42. As a general rule, however, evidence that was not before the tribunal and that relates to the merits of the decision is not permitted on judicial review. (quote is omitted) Attempting to introduce fresh evidence respecting the merits of the challenged decision on an application for judicial review misapprehends the nature of judicial review.
>
> 43. Whatever the standard of review, the review must be conducted on the record that the tribunal had… Whether there is a rational basis for the decision can only be determined by examining the evidence the tribunal had to work with: (authorities omitted)… Whether a decision is reasonable is not a search for some sort of universal truth: *Ryan*, supra, at para. 51. Any tribunal or court can only work with the evidence before it, and a decision may well prove to be reasonable, even though it can arguably be shown to be factually flawed. It follows that new evidence relating to the merits of the decision will seldom be admissible, as it is irrelevant to the issues before the Court on judicial review. (emphasis added)

[11] In *Abbott Laboratories v. Canada (Attorney General)* 2008 FCA 354, the Federal Court of Appeal noted:

> [37] The general rule in an application for judicial review is that the record before the Federal Court should not include any documentary evidence that was not before the

> maker of the decision sought to be reviewed. The rationale for this rule is judicial efficiency. In an application for judicial review, unlike an originating application (such as an application for prohibition under the NOC regulations), the Federal Court is not the decision maker of first instance, but rather is reviewing the decision of someone else, in this case the Minister. Judicial resources would be wasted if the parties to an application for judicial review of the Minister's decision, having failed to put their best foot forward before the Minister, could hope to provide additional evidence in the Federal Court to impugn the Minister's decision.

[12] Where a party makes a motion to introduce new evidence on a judicial review, it would appear that there are two distinct approaches that could be taken by the Court: either the "categorical approach" or, in the alternative, the test that has been developed for admitting fresh evidence on appeal (the *Palmer* test). In my view, having reviewed the cases that discuss both approaches, I find that the "categorical approach" is the most appropriate framework to be used in assessing such a motion. This was the conclusion reached by the Alberta Court of Queen's Bench in *Alberta Liquor Store Assn.* (supra), at paragraph 44, and I agree with that Court's analysis of the issue.

[13] Within that framework, the introduction of such evidence is to be regarded as exceptional. Certain categories of "exceptional" circumstances have been recognized. There are four generally accepted categories of evidence that have been permitted beyond the record in judicial review: lack of jurisdiction; bias;

breach of procedural fairness and natural justice; and fraud (*Sipekne'katik v. Nova Scotia* 2016 NSSC 260). None of those categories apply here.

[14] In *IMP Group International Inc. v. Nova Scotia* 2013 NSSC 332:

> [42] The evidence at issue in *Canada Life Assurance* consisted of correspondence subsequent to the Minister's decision. *Canada Life Assurance* was cited, along with other authorities, by the Alberta Court of Queen's Bench in *White v. Alberta (Worker's Compensation Board, Appeals Commission)*, 2006 ABQB 359 (CanLII), where Slatter, J said, at paras. 34-35:
>
> > Since the issue on which the new evidence was tendered is not a question of law or jurisdiction, it was not the subject of the appeal, but rather was a portion of the application for judicial review. Judicial review is traditionally conducted "on the record", and fresh evidence on the merits that was not before the tribunal is generally not permitted: *Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs)* (1995), 1995 CanLII 4372 (NSSC)…; *Ady v. Law Society of Alberta* (1994), 1994 ABCA 353 (CanLII)…
> >
> > The use of affidavits on judicial review is exceptional. They can be introduced when they are needed to establish the grounds for the application, but not when they are intended to alter or supplement the factual record used by the tribunal to decide the issue on the merits… Affidavits are allowed on judicial review to show bias, or some defect in the way the hearing was conducted, or sometimes that the decision was patently unreasonable (where that is not apparent from the record), or to show other types of reviewable error. Affidavits are not generally permitted just to show that a different decision would have been better than the one made. In the circumstance, the appellant was not permitted to rely on the new affidavit. Whether the decision that it is appropriate for the Appellant to relocate to find work is patently unreasonable must be decided on the evidence that was before the Appeals Commission…

[15] In *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency* 2012 FCA 22:

> [20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of

> evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17 – 18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> > (a) Sometimes the court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: (authorities removed). Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
> >
> > (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfill its role of reviewing for procedural unfairness: e.g. *Keeprite Workers Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
> >
> > (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, supra.

[16] The applicants have made a number of submissions to explain why, they believe, the evidence of Dr. Hallett should be admitted:

a) It is the submission of the applicants that the process/project actually approved by the Minister is, in fact, not the same process/project that was put before him. This relates to Dr. Hallett's point at #5 ("Does the proposal as approved by the Minister adequately distinguish how tires will be introduced into the Lafarge Brookfield kiln?") Specifically, note the

applicants, there is a significant difference between a process of introducing whole tires into the middle of the kiln (which, they say, is the approved process) vs. a process of introducing crumbled tires at the fuel entry point (which, they say, is the submitted project).

b) Dr. Hallett has pointed out some issues where, he says, the Record is silent. It is the applicants submission that Dr. Hallett's evidence would therefore be admissible under the the *Keeprite* exception (*Keeprite Workers Independent Union v. Keeprite Products Ltd.* (1980) CanLII 1877 (ONCA)); that is to say, it is new evidence that tends to show a complete absence of evidence on a material finding of fact made by the decision maker.

c) The applicants further point out that the categories under which this evidence can be admitted are not closed (see *Bernard v. Canada (Revenue Agency)* 2015 FCA 263); they therefore submit that the evidence should be admitted as it will "facilitate the reviewing court's task".

[17] I shall address the proposals in that same order.

[18] Firstly, as to the issue of the "submitted" project being substantively different than the "approved" project: in my view, that argument does not justify

the introduction of new evidence from Dr. Hallett. If the applicants are correct, and if the "submitted" project differs from the "approved" project, such will be apparent in the Record. If the approved project does not specify any process, and the submitted project specifies one specific process, such would also be apparent on the Record. The applicants would be free to argue that the Minister's decision was unreasonable on that basis. I make no comment about the merits of this argument, if it is made; but Dr. Hallett's proposed evidence is not material on that point.

[19] Secondly, I move to the submission relating to the *Keeprite* exception, arising from the Ontario Court of Appeal decision in *Keeprite Workers Independent Union v. Keeprite Products Ltd.* (1980) CanLII 1877.

[20] In *Keeprite*, a hearing was held before a labour arbitrator. The central issue before him was whether two employees had engaged in a "fight" on company premises; if a fight had occurred, the employees needed to be terminated, as per the collective agreement. Evidence of the altercation was presented during the hearing; however, the proceedings were not recorded. In his decision, the arbitrator found that a fight had, indeed, occurred.

[21] The applicant on judicial review argued that there was no evidence before the arbitrator that would have allowed him to make that finding. Unfortunately, given that there was no record of the proceedings, it was impossible to know what evidence had been put before the arbitrator.

[22] It was therefore decided that in those circumstances, evidence could be presented to the reviewing court, to clarify what evidence had in fact been placed before the arbitrator. The purpose of this "new" evidence was simply to clarify what had been before the arbitrator in the first place:

> 10 I should make it clear at this point that the material filed with the Divisional Court was directed to showing what the evidence was that was given before the arbitrator and was not fresh evidence of what happened on May 31, 1979 [i.e. the day of the alleged "fight"]. As is usual, no verbatim record was made of what transpired before the arbitrator.

[23] The *Keeprite* exception, therefore, is meant to address such areas of "evidentiary vacuum". Subsequent case law has made it clear that it is inappropriate to go beyond the strict boundaries of the exception.

[24] In *Jele v. Canada (Minister of Citizenship and Immigration)* 2017 FC 24, the issue before the Court was the respondent's decision to deny refugee status to the applicant. The respondent had noted in its decision that it found the applicant's account of her treatment by hospital staff in her native Uganda to be "highly unlikely". The applicant sought judicial review before the Federal Court. She

sought to tender new evidence from an expert in the area of medicine in developing countries, in an effort to show that the description she had given of her experience was, in fact, typical in such countries. The applicant argued that the proposed new evidence fell within the *Keeprite* exception, since it fell within a subject-matter upon which the respondent had had no evidence before him.

[25] The Federal Court disagreed and refused to admit the new evidence:

> [26] … the Rouhani Affidavit does not demonstrate that the RDP's conclusion was based on an evidentiary vacuum, but calls on the Court to conclude that the RPD's finding was in error based on the new evidence. In my view, this goes well beyond the second exception to the general rule [i.e. the *Keeprite* exception], and to accept it would be to place the Court in the position of making a decision on the merits of the claim, which is not its role…

[26] I also note the case of *Canadian National Railway v. Teamsters Canada Rail* (2017) NSSC 10, as to the *Keeprite* exception:

> [23] The use of such extrinsic affidavit evidence to demonstrate a complete absence of evidence on an essential point is rare and restricted. In *Asad v. Kinexus Bioinformatics Corp*, 2010 BCSC 33 (CanLII), 2010 BSCS 33 (*Kinexus*) the British Columbia Supreme Court referred to the exceptional circumstances where such extrinsic evidence may be admitted and commented upon the required content of such evidence at paragraphs 19 – 20:
>
> > 19 The use of extrinsic evidence to demonstrate factual error is seldom exercised. The admissibility of affidavit evidence in relation to an error of fact is restricted to rare circumstances where there is no evidence to support a material finding…
> >
> > 20 The court will not admit evidence if the alleged error may be addressed on the record, or if the admission would invite the court to re-evaluate or re-weigh the evidence heard by the Tribunal. If the court determines that extrinsic evidence is both necessary and would not invite a re-weighing, affidavit material must be restricted to identifying the alleged factual errors and the evidence necessary to demonstrate the errors.

[27] In my view, the proposed evidence of Dr. Hallett does not fall within the *Keeprite* exception. That exception is clearly meant to address evidence that *was* before the decision maker, but that, for one reason or another, is now unclear or absent. That is not the case with the proposed evidence of Dr. Hallett.

[28] Furthermore, while Dr. Hallett does note issues that are, in his view, not addressed in the Record, that does not make them issues that were "before" the Minister, or issues that were in any way material to the Minister's decision. The Minister's decision was to approve a pilot project based on the information he had before him. The issues raised by Dr. Hallett are not the subject of any "findings" by the Minister; therefore, it cannot be said that there was an "absence of evidence" before the Minister in respect of any such findings.

[29] Lastly, the applicants point out that the categories under which new evidence can be admitted on judicial review is not closed; that is to say, courts have always left open the possibility that new categories could be created, depending on the circumstances of any particular case. In the case at bar, the applicants submit that I should admit the evidence of Dr. Hallett because it will provide information that will "facilitate the reviewing court's task".

[30] I disagree. With the greatest of respect to Dr. Hallett, it is clear to me that his proposed evidence is directed toward one question: whether the decision of the Minister was "correct", either a) in the opinion of Dr. Hallett; or b) in an absolute sense, upon review of the science that exists in this area (in Dr. Hallett's words, "commonly accepted science or empirical evidence"). That is not the question before this Court; our task is an assessment of the "reasonableness" of the decision.

[31] In addition, the admission of evidence from Dr. Hallett would most certainly trigger other complications; for example, it would immediately cause the respondents to seek to tender opposing scientific opinions. This will turn this judicial review into a full "battle of experts", and a full re-hearing of the issue that was before the Minister. Again, that is not the Court's function here.

[32] I have already noted that the allowing of new evidence beyond the record in judicial review cases is exceptional. It is even more exceptional in the case of expert opinion evidence, for the very reasons I have already mentioned. In *3076525 Nova Scotia Ltd. v. Nova Scotia* 2014 NSSC 85, the Court noted:

> 12 It is agreed that the Minister has a wide discretion when issuing orders for the protection of the environment. Courts, when reviewing such orders, must give great deference to such decisions. It is not the Courts' function to second-guess or substitute their decisions for that of the Minister and it is not a retrial of the environmental issues raised in the matter. It is also not the function of the Courts to adjudicate on responsibility or liability for the pollution on an appeal such as this one. For the above reasons, courts, on appeal, have consistently refused to

> admit expert or opinion evidence which was not part of the Record of the Ministerial decision.
>
> 13 Having said that, Ministerial decisions and resulting orders must still be arrived at judiciously, based on all the evidence or facts before them and their Department. Therefore, in order to admit additional evidence on appeal, it must be to show that the Ministerial Order was the result of something other than a complete or good faith decision making process.

[33] The Court in *3076525 Nova Scotia Ltd.* allowed the tendering of an affidavit providing new "fact" evidence, but refused leave to tender a new expert report:

> 18 I find that the affidavit of Andrew Blackner, although it recites many historical facts, is in essence a new expert report and it contains many opinions. Based on the jurisprudence, it is not admissible as fresh or additional evidence on the appeal of the Ministerial order dated November 5, 2010. That would in effect result in a retrial of the matter.

[34] The applicants have provided me with only one case where expert opinion evidence was permitted beyond the record in judicial review: *Apotex v. Canada (Minister of Health)* [2013] F.C.J. No. 1401. I note the following portion of that decision, in relation to the circumstances in that case:

> 60 I agree that in appropriate circumstances on judicial review, such as in this case, where the legal issues and scientific issues are linked, the Court may benefit from expert affidavits which were not before the decision-maker in order to provide important context and knowledge not otherwise in the Court's knowledge or on the record.
>
> 61 Parts of the affidavits of Dr. Kibbe and Ms. Wehner fall squarely into the exception to the general rule noted in *Association of Universities* as they provide general background that will assist in the Court understanding the issues on the judicial review.
>
> 62 I find that the respondent has not been prejudiced by the applicant's submission of the two affidavits given that the respondent has had ample time to cross examine the affiants and has done so.

> 63 Moreover, a great deal of the information included in the affidavits is repetitive of the information included in the affidavit of Mr. Sherman and Mr. Goldberg, neither of which was objected to. I also note that the respondent's affiant, Mr. Adams, comments on passages of the affidavits in dispute. In addition, the parties have made written and oral submissions on the matters deposed to. Practically, while the respondent validly objects to the reliance on affidavits that were not part of the record before the decision-maker, and the opinions expressed that focus on the issue before the Court, the content of the two affidavits has been otherwise put before the Court.
>
> 64 However, I do not agree that the opinions expressed in the affidavits meet the exceptions as noted in *Abbott* and *Alberta Wilderness* and I am mindful of the caution in *Association of Universities.* While the opinions may indeed be relevant, they are not necessary - or at least they are no longer necessary - as similar opinions have been expressed in the written arguments and oral submissions and particular passages of these affidavits seek to buttress those positions. In addition, the opinions, and to the extent that legal argument is embedded in these opinions, focus on the issue that is before the Court.
>
> 65 I have reviewed both affidavits and both include a significant amount of information on the approval process, the formulation of the drugs (i.e. the chemical background, which is not in dispute and is addressed in the other affidavits and the arguments) and the experience of the affiants regarding the approval process for other drugs.
>
> 66 The respondent declined my request to identify parts of the affidavits of Dr. Kibbe and Ms. Wehner that would be acceptable to the respondent. I have, therefore, identified the parts of the two affidavits that express opinions, including the opinion on how the term "identical medicinal ingredient" should be interpreted, and have excluded those parts.

[35] It is clear from those paragraphs that the situation before the Court in *Apotex* was fairly unique. I do not find that its particularities apply here, and I find that case quite distinguishable on its facts.

[36] I also note the Federal Court of Appeal case of *Abbott* (supra), where parts of an expert opinion was admitted by the reviewing court, but only those parts that had originally been placed before the administrative decision-maker:

> [40] In this case, the expert opinion of Dr. Lewanczuk on patent construction was presented to the Minister orally at the meeting of May 7, 2007, as document in the letter dated June 7, 2007 to the Minister from Abbott's counsel. Justice Hughes properly exercised his discretion to consider paragraphs 44 – 51 of the affidavit of Dr. Lewanczuk dealing with his expert opinion, and to refuse to consider the other paragraphs of Dr. Lewanczuk's affidavit dealing with other matters.
>
> [41] Even if I had concluded that Justice Hughes was wrong to consider paragraphs 44 – 51 of Dr. Lewanczuk's affidavit, I would disregard that error in determining this appeal. There are three reasons for that. First, the Minister has never objected and still does not object to consideration of those paragraphs by Justice Hughes. Second, the substance of the paragraphs considered by Justice Hughes was set out in the letter dated June 7, 2007 from Abbott's counsel to the Minister. Third, there is no real controversy on the construction of claim 6 of the '620 patent.

Conclusion

[37] Therefore, with the greatest of respect to Dr. Hallett, in my view his evidence will not assist the Court in our specific role here, as a court of judicial review. Rather, the admission of such evidence would be, in my view, an inappropriate distraction.

[38] I dismiss the applicants' motion to tender the evidence of Dr. Hallett. If the parties cannot agree on costs, I will hear from them.

Boudreau, J.